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In the Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL ASSOCIATION OF RADIOTELEPHONE SYSTEMS,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–33a) is reported at 525 F.2d 630.[1] The Federal Communications Commission's Memorandum Opinion and Order of March 20, 1975 (Pet. App. 135a–266a), is reported at 51 FCC 2d 945; the Commission's Second Report and Order dated May 2, 1974 (Pet. App. 34a–134a), is reported at 46 FCC 2d 752; the Commission's Memorandum Opinion and Order of

[1] The opinion reproduced in the appendix to the petition contains modifications ordered by the court of appeals on January 22, 1976.

July 18, 1975, acting on further petitions for reconsideration and for clarification (Pet. App. 267a–273a), is reported at 55 FCC 2d 771.

JURISDICTION

The opinion and judgment of the court of appeals (Pet. App. 1a–33a) were entered on January 5, 1976. The petition for a writ of certiorari was filed on February 25, 1976. It invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission gave sufficient consideration to competitive factors in deciding: (a) to allocate radio frequencies for the development of a new "cellular" system for mobile common carrier communications service, and (b) to permit radio equipment manufacturers to apply for licenses to provide private radio dispatch service.

2. Whether the Commission has authority under the Communications Act to establish a new class of licensed entrepreneurs to provide private radio dispatch service to licensed users on a non-common carrier basis; and whether, having created this class and established a policy of open entry into the class, the Commission has authority to preempt inconsistent state regulation which might frustrate the open entry policy.

3. Whether the court of appeals' affirmance of the Commission's decision establishing a new class of licensees to provide private radio dispatch service was based on grounds discernible from the agency's orders.

STATUTES INVOLVED

Most of the relevant sections of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151–609, are set forth at Pet. App. 274a–292a. In addition 47 U.S.C. 151, 154(i), and 303(a)–(g), (r) are reproduced in the Appendix to this brief. Section 10(e) of the Administrative Procedure Act, 60 Stat. 237, as amended, 5 U.S.C. 706, is set forth at Pet. App. 293a.

STATEMENT

A. PUBLIC AND PRIVATE LAND MOBILE RADIO SERVICES

Land mobile radio services, which enable people to communicate while on the move, include two distinct classes of service operated under different regulatory schemes (Pet. App. 5a).[2]

One class is public or radiotelephone service, which is similar to the service the telephone company provides its subscribers in their homes or places of business. The telephone companies and radio common carriers ("RCCs") provide this class of service on a common carrier basis.[3] They are subject to common carrier regulation and, as users of radio frequencies, to the Commission's radio licensing authority. See generally 47 C.F.R. Part 21. Public land mobile radio systems often are interconnected with the landline telephone

[2] Land mobile radio services are distinct from Citizens Radio Service (Citizens Band). See 47 C.F.R. Part 95. This case does not involve Citizens Band frequency allocations or regulations.

[3] Licensees in this service also may provide paging or "beeper" service, and business "dispatch" service on a common carrier basis, in addition to ordinary two-way radiotelephone service.

system, which permits a customer with an automobile telephone, for example, to call or be called from an ordinary home or business phone.

The second class is private radio service, such as the dispatch service that is available to police and fire departments, or to such businesses as taxicab companies and firms with fleets of trucks. The typical system includes a central dispatcher which may communicate with personnel or vehicles in the field. Calls must be business related and brief, in contrast to the conversational calls that often occur in the public service. See 47 C.F.R. Parts 89, 91 and 93.[4]

Persons eligible to use private service frequencies presently have several options: (1) they may obtain their own facilities and operate their own stations individually; (2) groups of licensees may share jointly owned facilities; (3) groups of licensees may create non-profit corporations to provide facilities and service on a cost-shared basis; and (4) licensees may lease equipment and transmitter sites from non-licensed parties (usually equipment manufacture and sales organizations). See *Multiple Licensing—Safety and Special Radio Services,* 24 FCC 2d 510, 511–513. The shared, cooperative, and multiple licensing arrangements permit small businessmen, for example, who could not afford individual systems, to use mobile radio. They also make efficient use of radio frequencies. Licensees in the

[4] Private service may also consist of one-way or two-way paging, as is often the case with doctors in the Special Emergency Radio Service. *E.g.*, 47 C.F.R. 89.523(d), 89.525(c).

private services are subject to the Commission's radio licensing authority, but they do not act as carriers and are not subject to regulation under Title II of the Communications Act, which contains the common carrier regulatory statutes.

The two classes are technologically similar. They also share a common problem of long duration: inadequate spectrum allocation to meet a rapidly growing demand for service.[5] Delays in licensing and certification procedures at both the state and federal levels have also hampered utilization of available frequencies (Pet. App. 57a–58a and n. 5, 167a–173a).

B. PROCEEDINGS BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

The Commission in 1968 instituted Docket No. 18262 to examine the possibility of making substantial additional frequency allocations for land mobile radio, to elicit proposals for more efficient use of the spectrum, and to develop a regulatory scheme that would minimize delays in authorizing service. Almost 100 parties filed comments and 35 parties participated in oral argument at two different stages of the seven-year proceeding. The Commission ultimately decided

[5] Pet., p. 6. For a concise discussion of the congestion problems in the land mobile radio services, see *Final Report of the President's Task Force of Communications Policy*, chapter 8 (1968). See also *Land-Mobile Use of TV Channels*, 23 FCC 2d 325, 329–339. The radio spectrum is allocated by reserving for particular uses the right to broadcast radio waves in a specified range of frequencies per second. One MHz (megahertz) measures one million wave cycles per second.

(1) to allocate 40 MHz for development of a new "cellular" system concept of public radiotelephone service, (2) to allocate 30 MHz for private services, and (3) to set aside 45 MHz as a land mobile "reserve allocation" without specifying its use. Although the Commission did not allocate additional frequencies for radio common carriers who do not utilize a cellular system in Docket No. 18262, it did make some frequencies available for that purpose in a companion proceeding.[6]

1. *Cellular Systems.*—The Commission found that development of a new high capacity "cellular" system will permit "multiple re-use of channels throughout a given geographical area and more traffic intensity per unit of spectrum * * * than other land mobile communications system[s] proposed to date" (Pet. App. 36a–37a, 152a and n. 17, 5a–6a). Technology and costs make it unfeasible for more than one system to operate in each community (Pet. App. 48a). Although the Commission decided ultimately to permit any qualified entity, including non-wireline firms, to apply, it established demanding eligibility standards to ensure that an applicant for a license to establish a cel-

[6] *Land-Mobile Use of TV Channels* (Docket No. 18261), 23 FCC 2d 325. The Commission has stayed grants of licenses for those new frequencies pending resolution of demands that no new carriers be licensed. *Land-Mobile Use of TV Channels*, 31 FCC 2d 48. In addition, the Commission expressly contemplated in Docket No. 18262 that owners of present RCC systems will have a "major role" in development of the new private systems it was authorizing (Pet. App. 185a).

lular system will have the resources and expertise to complete the project[7] (Pet. App. 152a–154a). The Commission also decided to permit cellular systems to offer limited dispatch service on a common carrier basis, as well as radiotelephone service. It concluded that a cellular system licensee should be permitted to offer dispatch service because excluding such service might delay or even foreclose the development of cellular systems, and might deprive the public of the benefits of "natural economies" resulting from a combination of dispatch and radiotelephone services (Pet. App. 49a–50a).

The Commission noted that permitting wire line carriers to operate cellular systems creates a potential for anticompetitive abuse; it therefore imposed restrictions upon such carriers to minimize the possibility of cross-subsidization with profits from wireline or other operations. To operate cellular systems, such carriers must establish separate corporations with separate officers, operating personnel, and accounting, and they are prohibited from manufacturing system equipment (Pet. App. 48a–49a, 145a–148a).

2. *Private Services and Specialized Mobile Radio Systems.*—The Commission decided that the newly allocated private service frequencies should be available not only to eligible users of those services, but also to a new class of licensees who may use the frequencies on a commercial basis to serve eligible users.

[7] The Commission at first restricted eligibility to wireline carriers (Pet. App. 47a–48a). That restriction was removed on reconsideration (Pet. App. 150a).

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Those licensees, who will operate stations known as specialized mobile radio systems ("SMRs"), will be limited to dispatch service and to the brief, business-related messages previously authorized for private service. They may not serve the general public, nor may they provide ordinary radio-telephone service. (Pet. App. 137a–138a, 161a–163a.) The SMRs will not be required to serve users on a common carrier basis and will make arrangements privately and contractually for service and facilities (Pet. App. 161a and n. 22, 166a, 54a–58a, 23a–26a).

The Commission concluded that it would be inappropriate to apply common carrier regulation to SMRs or to process license applications under procedures customarily used in licensing new common carriers. It found (Pet. App. 185a) that RCCs generally have confined their service offerings to radio telephone and one-way signalling, and have not made a significant effort to meet the need for dispatch service. It established an "open entry" policy for SMRs to obviate the "interminable delays" that have attended the establishment of new service in other frequency bands (Pet. App. 166a, 182a, 57a and n. 5). Applications for SMRs will be processed and granted in the order of filing, along with applications for individual or shared systems in the same frequency band. The Commission will not entertain petitions to deny which are based on concepts such as the adequacy of existing facilities to provide service. Finally, the Commission declared that its regulations constitute "federal preemption of possible assertion

of state entry certification" of SMRs because it recognized that some states might attempt to regulate SMRs in a manner inconsistent with the Commission's open entry policy (Pet. App. 186a–189a).

C. PROCEEDINGS IN THE COURT OF APPEALS

The petitioner, National Association of Radiotelephone Systems (NARS), and others, filed petitions for review in the United States Court of Appeals for the District of Columbia Circuit attacking various aspects of the Commission's order. NARS is a trade association representing radio common carriers. Its members are generally subject to both federal and state regulation as radio licensees and as communications common carriers.

Some petitions for review contended that various frequency allocations were excessive or insufficient. Some contended that the Commission decision creates an undue risk that some or all land mobile radio services will be monopolized by AT&T and/or Motorola, Inc., a major equipment manufacturer. NARS and others also asserted that the Commission has violated the Communications Act by exempting SMRs from common carrier regulation under Title II of that Act and by preempting state regulation of SMR activities.

The court of appeals affirmed unanimously (Pet. App. 1a–33a).[8] It concluded that possible anti-com-

[8] That court subsequently stayed its mandate pending application for a writ of certiorari. The stay has the effect of preventing implementation of those portions of the Commission order relating to SMRs.

petitive effects are at present "too speculative and distant in time" to constitute an abuse of agency discretion, although such effects are subject to future challenge if they become manifest (Pet. App. 33a).

The court first rejected challenges to the allocation of frequencies. It noted that given this "highly technical anad somewhat speculative undertaking" (Pet. App. 9a) "* * * such determinations are precisely the sort that Congress intended to leave to the broad discretion of the Commission * * *" (Pet. App. 10a).

The court found "significant plausibility" to the allegations that AT&T might dominate radiotelephone and/or dispatch services, and that the restrictions which the Commission imposed to prevent anticompetitive conduct by AT&T may not be sufficient to prevent AT&T domination. Nevertheless, it concluded that the Commission did not exceed its broad discretion in allocating frequencies for the development of a cellular system. (Pet. App. 10a–16a.) [9] The court said that any anticompetitive effects of development of the cellular system were "speculative" and "contingent upon a variety of factors" that remain undetermined, and noted that the Commission would

[9] The court of appeals misunderstood one aspect of the Commission's decision. It said the Commission's decision to eliminate a requirement that telephone companies interconnect with RCCs is "puzzling" (Pet. App. 12a and n.29). The Commission did not in fact take any action affecting the interconnection rights of RCCs. The Commission merely deleted a requirement that telephone companies interconnect with SMRs when it decided not to authorize SMRs to provide radiotelephone service. Compare Pet. App. 62a–63a with 137a–138a.

have a continuing duty to be "on the lookout for possible anticompetitive effects" as the cellular system develops (Pet. App. 14a–15a).[10]

Allegations that the Commission's failure to exclude equipment manufacturers as SMRs would lead to Motorola's domination of the dispatch market appeared to be less plausible to the court of appeals. It said that the present record did not show that Motorola's entry into that market would produce "such anticompetitive effects * * * as would constitute a colorable violation of the antitrust component of the public convenience, interest or necessity standard" (Pet. App. 31a).

The court also held that the Commission had not exceeded its powers by exempting SMRs from common carrier regulation under the Communications Act or by preempting state regulation of SMRs, because SMRs "are not common carriers" (Pet. App. 18a–28a, 31a–32a). The court concluded that the term "common carrier" is used in the Communications Act to describe one who holds himself out to serve the public indiscriminately or indifferently and, therefore, one is not a common carrier who makes "individualized decisions, in particular cases, whether and on what terms to deal" (Pet. App. 20a–21a). The court found nothing in the Commission's orders or regulations

[10] The court of appeals also was "strongly influenced" by the Department of Justice's support for the Commission's order. The court observed that the Department's position, like the court's, was based in part on the "ample opportunity" to challenge anticompetitive effects when they become assessable (Pet. App. 15a–16a).

which would require SMRs to hold themselves out indiscriminately to serve all eligible users, and declared that there is no reason to suppose they will do so voluntarily; they were much more likely to deal on an individual contract basis. Since SMRs are not common carriers the Commission was not required to subject them to rate regulation under Title II of the Communications Act or to process applications under procedures customarily used for communications common carriers, and was not precluded from preempting state regulation by the Communications Act's provisions reserving jurisdiction to the states to regulate intrastate activities of communications common carriers. The court specifically held, however, that the decision "is subject to future challenge should SMRs in practice behave as common carriers" (Pet. App. 33a).

ARGUMENT

The court of appeals correctly recognized the contingent and developmental nature of the Commission's response here to new service needs in the dynamic field of radio communications. In light of that court's comprehensive exploration of the record, there is no reason for further review by this Court.

1. The Commission adequately considered competitive factors in authorizing development of a cellular system, in permitting cellular systems to perform dispatch service, and in permitting equipment manufacturers to apply for SMR licenses. Its decision fully accords with this Court's decision in *Gulf States Utilities Co.* v. *Federal Power Commission*, 411 U.S. 747.

In *Gulf States Utilities* this Court held that the FPC erred in refusing to consider the possible anticompetitive effects of authorizing a particular transaction. Here, the Commission carefully analyzed the possible anticompetitive effects of each decision and ultimately concluded that the probable benefits to the public outweighed any risk that its decision might lead to a lessening of competition. The Commission also imposed restrictions aimed at AT&T and Motorola to minimize the risk that either of those companies will dominate either service (Pet. App. 47a–51a, 139a, 145a–148a, 177a).

Gulf States Utilities does not preclude a regulatory agency from authorizing under a "public interest" standard a transaction or activity which might have adverse competitive effects, if the agency concludes on an adequate factual foundation that the risk is outweighed by the need to promote other public interest factors entitled to equal or greater weight under the statute. Indeed, failure to consider such other factors might violate an agency's statutory obligations. See *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86; cf. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System*, 419 U.S. 281, 298–299; *Gulf States Utilities, supra*, 411 U.S. at 758–759, 762–763.

Although the court of appeals believed that the Commission had underestimated the risk of AT&T's domination of radiotelephone and dispatch service, that court quite properly refrained from substituting

its assessment of that risk for the carefully considered judgment of the Commission. For primary responsibility to determine when the public interest requires new departures in regulated service is vested in the Commission. See, *e.g., United States* v. *Midwest Video Corp.*, 406 U.S. 649; *United States* v. *Southwestern Cable Co.*, 392 U.S. 157.

Contrary to petitioner's assertions, the court of appeals' reliance upon continuing scrutiny by the Commission (and the Department of Justice) accords with the regulatory scheme Congress has established. The question before the court was whether the Commission had acted rationally in balancing the risk that the development of cellular systems would lead to AT&T domination, against public benefits from the development of such systems. In answering that question, the court correctly concluded that the Commission's duty of continuing oversight strongly supported its assessment of the competitive risks.

2. The court of appeals correctly concluded that SMRs are not common carriers. Therefore, the Commission was well within its powers and responsibilities in adopting a policy which treats them as private contractors rather than as common carriers, and which protects that policy by preempting state control of entry by SMRs into private commercial service.

The petitioner errs in contending (Pet. 29–31) that the term "common carrier" in the Communications Act encompasses all persons who provide "for hire" communications services. To regulate communication common carriers Congress adopted Title II of the

Act (47 U.S.C. 201–223), which incorporated the traditional definition of common carrier (47 U.S.C. 153(h)). That definition had been applied earlier in the Interstate Commerce Act (49 U.S.C. 1), on which Title II of the Communications Act (47 U.S.C. 201–223) is modeled. S. Rep. No. 781, 73rd Cong., 2d Sess. 2 (1934). The traditional definition recognizes a clear distinction between common and private carriers. A common carrier holds itself out to serve all members of the public without discrimination. *Stimson Lumber Co.* v. *Kuykendall*, 275 U.S. 207, 210–212. Its status turns not on its corporate character or declared purpose, or on the views of its state of incorporation, "but upon what it does." *United States* v. *California*, 297 U.S. 175, 181; *United States* v. *Brooklyn Terminal*, 249 U.S. 296, 304. Indeed, a firm may offer related services to the public some of which are common carrier, and some of which are private individual offerings. *Terminal Taxicab Co.* v. *District of Columbia*, 241 U.S. 252, 255–256. The court of appeals found that SMRs were neither required nor likely to hold themselves out to serve the public at large, but would deal with their customers on a highly individual basis (Pet. App. 23a–28a). Since Title II of the Communications Act is limited to "common carriers" (47 U.S.C. 201), its regulatory provisions are inapplicable to private users of radio for communications services, who are licensed under Title III (47 U.S.C. 301–399). Thus, since SMRs are not common carriers. there is no basis for petitioner's contention (Pet. 24–26) that the Commission has un-

lawfully deregulated them.[11] If future experience shows, however, that SMRs in fact are operated as common carriers, then, as the court of appeals noted (Pet. App. 26a), the Commission's classification may be revised or challenged. Cf. *Frost Trucking Co.* v. *Railroad Commission,* 271 U.S. 583, 599–600.

It follows that petitioner also errs in contending that Sections 2(b) and 221(b) of the Act (47 U.S.C. 152(b), 221(b)) bar the Commission from preempting state control over entry. These sections in substance provide that nothing in the Act shall be construed to give the Commission jurisdiction over communications "common carriers" operating wholly intra-state. Since these sections are expressly limited to "common carriers," they are inapplicable to non-common carrier radio licenses. Because radio is inherently interstate (*Fisher's Blend Station, Inc.* v. *State Tax Commission,* 297 U.S. 650, 655), only the Commission may grant licenses and regulate their use. *Federal Radio Commission* v. *Nelson Brothers Bond and Mortgage Co.,* 289 U.S. 266, 279. Moreover, since unrestricted entry is the very heart of the Commission's regulatory policy for SMRs, restrictive entry policies under some state regulatory schemes pose a direct conflict with the authority the Commission has asserted (Pet. App. 186a–189a). Cf. *Head* v. *New Mexico Board of Examiners,* 374 U.S. 424.

[11] For this reason petitioner's reliance upon *Federal Power Commission* v. *Texaco, Inc.*, 417 U.S. 380, is incorrect. Here, the Commission will continue to regulate SMRs as radio licensees rather than as common carriers.

3. The decision below does not violate the rule announced in *Securities and Exchange Commission* v. *Chenery Corp.,* 318 U.S. 80, 95, that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." The Commission's decision with respect to SMRs is based in part upon the premise that SMRs will act as private carriers.[12] It is evident from the Commission's opinion that it believed SMRs would conduct their businesses by contract and that customers would "negotiate" with SMRs for service and facilities. It stated that SMR facilities would be made available by means of the same "marketing practices" under which licensees obtain radio gear, and it contemplated that SMRs would participate in a "free competitive market" (Pet App. 57a–58a, 161a and n. 22, 166a). Its decision also includes an appendix to the Commission's reconsideration order, which discusses the concepts of "indifferent" or "indiscriminate" service and cites the cases on which the court of appeals relied (Pet. App. 247a). Thus, the court did not encroach upon the agency's responsibility by originating some novel concept of the public interest never considered by the agency. Rather, it was able to

[12] The Commission did offer some alternative reasons for concluding that it has power to exempt SMRs from Title II and state regulation which the court of appeals rejected. However, the *Chenery* rule does not preclude a court from affirming an agency's adequately supported assertion of power merely because it disagrees with some of the agency's theories with respect to the scope of its jurisdiction.

"discern in the Commission's opinion a rational basis for its [action]" (*Bowman Transportation* v. *Arkansas-Best Freight System, supra,* 419 U.S. at 290), which the court highlighted in explaining its affirmance of the agency's decision. Reconsideration by the agency would serve no purpose since the substance of the Commission's decision is not seriously contestable, and there is "not the slightest uncertainty" as to the outcome of remand proceedings. *National Labor Relations Board* v. *Wyman-Gordon Co.,* 394 U.S. 759, 766, n. 6. See also *Penn-Central Merger Cases,* 389 U.S. 486, 518 n. 10, 526 n. 14; Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders,* 1969 Duke L.J. 199.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*:

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

§ 154. Federal Communications Commission

* * * * *

(i) Duties and powers.

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

§ 303. Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

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